

C & J Transport Co. and Gilbert W. Wozniak, Case 30-CA-7010

25 November 1983

DECISION AND ORDER

MEMBERS ZIMMERMAN, HUNTER, AND
DENNIS

On 16 May 1983 Administrative Law Judge Richard L. Denison issued the attached decision. The Charging Party filed exceptions and a supporting brief, and Respondent filed a brief in opposition to the Charging Party's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,¹ findings,² and conclusions³ and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹ The Charging Party contends that certain of the judge's procedural rulings showed bias and prejudice in favor of Respondent. Upon careful examination of the judge's decision and the entire record, we are satisfied that the contentions of the Charging Party in this regard are without merit.

² The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ In the absence of exceptions, Members Hunter and Dennis find it unnecessary to pass on the judge's finding that it was unnecessary to resolve the question whether deferral to the arbitration proceeding is appropriate under the deferral guidelines set forth in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).

DECISION

STATEMENT OF THE CASE

RICHARD L. DENISON, Administrative Law Judge: This case was heard in Milwaukee, Wisconsin, on October 19 and 20, 1982, based on an original charge in Case 30-CA-7010, filed by Gilbert W. Wozniak on March 11, 1982. The complaint, issued May 10, 1982, as amended, alleges that the Respondent violated Section 8(a)(1) and (3) of the Act on or about January 18, 1982, by discharging Gilbert W. Wozniak, the steward for Local 200, because of his union and concerted activities.

The Respondent's answer denies the allegations of unfair labor practices alleged in the complaint. Upon the entire record in the case, including my observation of the

witnesses and consideration of the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Based on the allegations of fact contained in paragraphs 2(a), 2(b), 2(c), and 3 of the complaint, respectively, admitted by the Respondent's answer, I find that the Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNFAIR LABOR PRACTICES

The Respondent is engaged in the interstate transportation of automobiles and commercial vehicles by tractor-trailer. Each driver has an assigned vehicle, which is responsible for loading in accordance with accepted company procedures. Accordingly, the arrangement of the particular vehicles to be transported in a given load is an important consideration in minimizing total height to conform with the restrictions imposed by highway overpasses. Likewise, once a vehicle has been loaded, the driver is not supposed to leave the Respondent's yard until the load has been checked by the load supervisor. Furthermore, the Respondent has available in its yard an L-shaped measuring device set at 13 feet 6 inches, the maximum permissible height, which may be swung over the top of the trailer to ensure that the load is not over height.

Gilbert W. Wozniak first became employed by the Respondent as a part-time employee in 1954. He became a full-time driver on February 5, 1962. Thereafter, until the date of his termination on January 18, 1982, he transported new cars to dealers in Illinois, Michigan, Iowa, and Indiana. Wozniak became steward for Teamsters General Local No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, when he was elected to that office in October 1969. He remained as steward until his discharge, by which time he had been personally involved in about 35 grievances against the Respondent, of which the major cases are as follows: In 1969 Wozniak won a grievance over drivers' pay shortages. In 1971, as a result of a complaint Wozniak made to the Union about the Company, he obtained an extra 50 cents per hour for part-time employees, in lieu of the Company paying health and welfare benefits for them. In 1978 he filed a grievance which ultimately cost Respondent \$12,000 for eight air-conditioning units for new vehicles the Company had purchased without the air-conditioning required by the contract. In 1981, when the Company changed its location, Wozniak filed a grievance which obtained additional mileage pay for drivers as a result of the added distance.

According to Wozniak, beginning in 1969 or 1970, "right up until the end of my employment there," Terminal Manager Virgil Solberg would tell Wozniak "every time a shortage slip would go in, he would say words to the effect of 'you're trying to break the company. You never give up with some of these things. The Company

is hurting. You're trying to get everything you can out of the company." Wozniak was unable to specifically relate the places, dates, and precise content of any of the conversations he generally described.

Wozniak belonged to the Teamsters for a Democratic Union, a dissident employee group within the Teamsters which publishes literature and conducts activities critical of the Union's leadership. Wozniak distributed T.D.U. literature by leaving it in the drivers' room from whence it disappeared, but he admitted that he had never seen who picked up the literature, nor did he know who took it. He also posted T.D.U. notices on the bulletin boards in the drivers' room. Wozniak testified that Yard Operations Manager Suscha talked with him about the T.D.U. "almost at least weekly, and from November, 1980, it was almost a daily occurrence." Suscha would ask Wozniak for copies of the T.D.U. newspaper, *The Convoy Dispatch*, and Wozniak would procure them for him. However, the substance of the conversations with Suscha which Wozniak described were not about the T.D.U., but about concessions which Suscha felt it would be necessary for the Company to obtain from the Union in forthcoming negotiations because of the economic situation in the automobile industry. Once again Wozniak was unable to identify or relate in detail any particular conversation. Wozniak also testified that he talked with Garage Supervisor George Cabanac at various times in October and November 1981 about concessions, but once again was unable to specify either a date or relate anything more detailed than a generalized description of the content of their discussions.

In November 1981, Wozniak claimed to have had a conversation with Emil Schneider, Respondent's executive vice president, in the loading area of the Company about 3 to 3:30 p.m. No one else was in the immediate area. Wozniak had been sitting in his truck, filling out paperwork. According to Wozniak, he was getting out of his truck as Schneider drove up in his car and motioned for Wozniak to approach. There ensued a conversation on "the general economy." Wozniak then related in his testimony fragments of a conversation which he described as lasting about half an hour. At some unidentified point in this conversation he claimed Schneider asked him, "Why don't you get out of the T.D.U.?" Wozniak allegedly answered that he felt the organization would be of benefit to himself and perhaps the Company. At this point in his testimony Wozniak's memory failed. He stated he could not remember anything further concerning the conversation. However, after specific leading by counsel for the General Counsel, he remembered that Schneider had stated that he had seen the *Convoy Dispatch* newspaper. He also stated that he thought the Union might have to make concessions. This was the sum total of what Wozniak could remember about the 30-minute conversation. Schneider agreed that he had engaged Wozniak in conversation "many times," but insisted "we never talked about T.D.U." He agreed that it was possible he might have talked to Wozniak at his car in November 1981, but again specifically denied

discussing the subject of the T.D.U. I credit Schneider's very emphatic and specific denial.¹

Wozniak completed a vacation period about January 1, 1982. During the first week of January he was on layoff status. At the end of this time he received a telephone call from Vice President and General Manager McQuaid telling him to report for work on January 11. This was later changed to January 12 because of cold weather. On the morning of January 12 Wozniak reported for work shortly before 7 a.m. He was told by Supervisor Suscha that his assigned tractor-trailer was in the shop being repaired. Suscha gave Wozniak the keys to another tractor-trailer combination to be loaded for a delivery to the Chicago area. Wozniak fueled the vehicle and drove it to the loading area where he found four Ford Escorts, two Ford vans, and one Ford LTD station wagon assigned to him for delivery. Despite the fact that he was loading an unfamiliar trailer, and that there are height variations caused by differences in the dimensions of wheels, tires, and the amount of inflation of the air bags supporting the trailer, Wozniak loaded the vehicles in the same pattern he would have used had he been loading his regularly assigned rig. The investigation conducted by the Respondent following Wozniak's accident revealed that another vehicle arrangement would have reduced the overall height. After completing loading, Wozniak left for Chicago without measuring the height of the load with the L measuring device, which would have revealed an excessive overall height. Instead, he testified, he "eyeballed" the load, a euphemism for guesswork, based on mere observation from the ground. Furthermore, although he acknowledge that he was supposed to have the height of the load checked by Supervisor Suscha, he nevertheless left the yard without having obtained the requisite inspection and approval. Later that morning, pursuant to a previous arrangement, Wozniak met a C & J driver named Schmunk for breakfast at an establishment at the intersection of Wisconsin Highway 20 and Interstate 94, before proceeding on to Chicago. Over breakfast the two drivers decided to use Interstate 294, rather than the northern approach to Chicago, in order to circumvent a 12 foot, 6 inch bridge on the north side of the downtown area. Nevertheless, because his unmeasured load was excessively high, the 159th Street bridge tore the top from one of the Ford vans in Wozniak's load. It is undisputed, according to the subsequent investigation conducted by the Respondent, that had Wozniak proceeded slowly under the overpass on the extreme right-hand side of the sloping road, he would have cleared the bridge. However, using the second lane from the right-hand side, Wozniak hit the bridge at approximately 45 to 50 miles an hour. Wozniak testified that he believed the air valve that releases air from the air bag suspension system on the trailer had frozen on the trip to Chicago from Milwaukee leaving the trailer excessively high. Neither Wozniak nor subsequent investigation by

¹ As noted above, Wozniak's memory concerning this conversation between he and Schneider was fragmentary, at best. I am persuaded that Wozniak's memory concerning particular conversations is unreliable. This conclusion is reinforced by his decided tendency to generalize with respect to other conversations, as discussed earlier in his decision.

the Respondent confirmed his speculation concerning this possibility. On arriving at the Chicago Auto Arena, Wozniak telephoned Terminal Manager Solberg and reported the accident. Solberg instructed Wozniak to have driver Schmunk bring the damaged van back to Milwaukee.² Wozniak completed his delivery, returned to Milwaukee, and reported to work the following day. After loading his trailer, in the midst of preparations to leave, Supervisor Suscha notified him that he was reassessing the run and instructed Wozniak to go to the office and fill out an accident report. In the process he had two conversations about the incident, one with Vice President James McQuaid and another with General Manager Emil Schneider. Wozniak told Schneider about his theory concerning the air bags on the trailer. Schneider stated that it was a very expensive accident, and he would have to check into the matter. Wozniak received a letter of suspension, dated January 14. On Monday, January 18, Wozniak received a discharge notice terminating him because of the accident.³ The Respondent contends that Wozniak was discharged only because he had a major chargeable accident within the meaning of Rule 1(a) of the uniform rules and regulations of the collective-bargaining agreement. The General Counsel argues that Wozniak was really discharged because of his union activities, specifically his success in filing grievances as the Union's steward, and because of his open support and activities on behalf of the T.D.U. As the mainstay of his case, the General Counsel relies heavily on two areas of his evidence which he claims reveal the Respondent's alleged unlawful motive. The first area is the series of discussions Wozniak had with various members of supervision in which references to his union activities and the T.D.U. arose. I have already found Wozniak's testimony concerning these conversations to be extremely general. Concerning the conversation between Wozniak and Emil Schneider in the loading area, on which the General Counsel places great reliance, I have credited Schneider's denial of Wozniak's assertion that Schneider stated Wozniak should get out of the T.D.U. In any event, over and above the question of credibility, I find, in any event, that these conversations consist of nothing more than the innocuous discussion in the absence of specific evidence that the Respondent actually resented Wozniak's success as a steward and activities as a T.D.U. member.

The other area on which the General Counsel places great emphasis concerns his argument that Wozniak was

treated discriminately in that he was discharged for conduct for which other drivers had previously received a lesser penalty. The General Counsel cited eight instances occurring between the years 1966 and 1977 involving employees Lloyd Anderson, William Beecher, Burton Bunker, Douglas Dickinson, George Larson, Laverne Neas, James E. Walker, and William Lutz, in which the respective employees, who had major chargeable actions, received lesser penalties, or else had their discharges reduced to a lower form of disciplinary action. I find this evidence unpersuasive. Not only are the cited examples remote in time from the events of the instant case, but also there is no evidence to show that the other employees referred to engaged in the same or other serious misfeasance as did Wozniak when he wrongly loaded, failed to measure, and failed to obtain approval of his load on an unfamiliar trailer, and thereafter ran it under the Chicago overpass at 50 miles per hour on an interior lane.

It may well be that the Respondent was not entirely unhappy that it was Wozniak who engaged in what the Respondent described as "gross negligence." But lack of remorse by the Respondent at a legitimate opportunity to discharge Wozniak does not prove a case of unlawful motive under the Act. As the Board stated in *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966):

The mere fact that an employer may desire to terminate an employee because he engages in unwellcome concerted activities does not, of itself, establish the unlawfulness of a subsequent discharge. If an employee provides an employer with a sufficient cause for his dismissal by engaging in conduct for which he would have been terminated in any event, and the employer discharges him for that reason, the circumstances that the employer welcomed the opportunity to discharge does not make it discriminatory and therefore unlawful. This, at most, is the situation in the present case.

I find that the General Counsel has failed to prove by a preponderance of the evidence that the Respondent was unlawfully motivated by his union and concerted activities when it discharged Gilbert Wozniak on January 18, 1982. Instead, I find that the only reason for Wozniak's discharge was the circumstances surrounding the accident in which he was involved on January 12, 1982.⁴

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, the Intervenor herein, is a labor organization within the meaning of Section 2(5) of the Act.

² Schmunk was not called to testify.

³ Wozniak grieved his termination as a result of a major chargeable accident within the meaning of the collective-bargaining agreement. Ultimately, he received an unfavorable decision in final and binding arbitration before the Central-Southern Conference Automobile Transporters Arbitration Committee pursuant to art. 7, sec. 4(b), and art. 7, sec. 5(b), of the collective-agreement. In view of my decision herein, I find it unnecessary to rule on the alternative issue in this case concerning whether or not to defer to the arbitration decision pursuant to the Board's doctrine enunciated in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).

⁴ Cf. *Stoutco, Inc.*, 218 NLRB 645, 650-651 (1975).

3. The Respondent has not violated Section 8(a)(1) and (3) of the Act in discharging Gilbert W. Wozniak on January 18, 1982, for a major chargeable accident in which he was involved on January 12, 1982.

On these findings of fact and conclusions of law and on the entire record I issue the following recommended

ORDER⁶

The complaint is dismissed.

⁶ In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.